THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: 10619/15

THE BODY CORPORATE OF HARBOUR VIEW SECTIONAL TITLE SCHEME **APPLICANT**

and

PEDRO WEBB **RESPONDENT**

And in the matter between Case No: 10618/15

THE BODY CORPORATE OF HARBOUR VIEW SECTIONAL TITLE SCHEME **APPLICANT**

and

ARLENE WEBB **RESPONDENT**

Coram: ROGERS J

Heard: **17 NOVEMBER 2015**

Delivered: **17 DECEMBER 2015**

JUDGMENT

ROGERS J:

Introduction

[1] These applications for provisional sequestration were heard together. The applicant is the Body Corporate of Harbour View located in Woodstock. The respondents are co-owners of Unit 62 together with a third person Charmaine Webb. I shall refer to the co-owners by their first names. The applicant's claim against the respondents is for outstanding levies in respect of Unit 62 together with interest thereon.

[2] Mt van Reenen appeared for the applicant and Mr Langenhoven for the respondents.

[3] Pedro, Arlene and Charmaine bought the property during May 2006 for R468 000, initially for investment purposes. A bond of R385 000 was registered in favour of First National Bank ('FNB'). Pedro and Arlene were at that time married to each other. Charmaine is Pedro's sister. Pedro and Arlene got divorced in October 2008. According to Arlene, Pedro moved into Unit 62 during 2010 on the basis that he would henceforth be responsible for the property expenses.

[4] During May 2011 the applicant issued summons against the co-owners in the Cape Town Magistrate's Court for arrear levies. There having been no appearance to defend, the applicant on 28 July 2011 obtained default judgment against the co-owners jointly and severally in the amount of R59 488,91 with interest a tempore morae and costs of R1214,67.

[5] Following unsuccessful discussions between Arlene's lawyers and Pedro in the latter part of 2012 and early 2013, Arlene instituted proceedings in this court (Case 4129/13) to terminate the co-ownership. On 27 June 2013 an order in her favour was granted by Mantame J. In essence, Pedro and Charmaine were afforded an opportunity to buy Arlene's share, failing which the property was to be marketed and the net proceeds distributed among the co-owners. For whatever reason effect has not been given to this order and the property remains registered in the names of the three co-owners. There is nothing on the papers to indicate that they co-ownership is not in equal shares.

[6] The present applications were issued on 5 June 2015. The applicant alleged in the founding papers that its claim now totalled R304 000, being the original judgment debt together with interest thereon and further arrear levies. The respondents have opposed the applications, using of the same attorney.

[7] On 29 July 2015, and simultaneously with delivering her answering papers in the sequestration application, Arlene delivered an application in the Cape Town Magistrate's Court for the rescission of the default judgment of July 2011. The present applicant, as the plaintiff in those proceedings, filed papers opposing the rescission. When the sequestration applications served before me the rescission application had been argued and judgment was awaited. As will appear below, judgment was subsequently granted in Arlene's favour.

[8] Pedro stated in his answering papers in the sequestration application that he intended filing a rescission application but he has not yet done so.

[9] The question at this stage is whether I am satisfied that prima facie (i) the applicant has a claim of not less than R200; (ii) that the respondents have committed an act of insolvency or are insolvent; (iii) that there is reason to believe that it will be to the advantage of creditors if the respondents are sequestrated.

The Master's certificate

[10] The respondents contend that the applicant has not complied with s 9(3)(b) of the Insolvency Act 24 1936 because the Master's report, which certifies the furnishing of security and is dated 22 June 2015, was only issued after the founding papers were signed. This argument is without merit. Section 9(3)(b) requires that the application be accompanied by a certificate of the Master given not more than ten days before the date of the application. There is no requirement that the certificate be issued before the date of the application (see *Mafikeng Creamery (Pty) Ltd v Van Jaarsveld* 1980 (2) SA 776 (NC) at 780; *De Wet NO v Mandelie (Edms) Bpk* 1983 (1) SA 544 (T) at 546). A certificate issued after the date of the application meets the requirement that it should not be stale. In this division, at any rate, the practice is that the Master's report, which incorporates the certificate, is issued after the papers have been signed and served on him.

The applicant's locus standi

[11] The respondents allege that any claim for arrear levies vests in Propell Sectional Title Solution (Pty) Ltd ('Propell'), an entity which lent the applicant money and took cession of the applicant's levy claims as security. A levy statement attached by Pedro to his affidavit is in the name of Propell. In argument the respondents referred me to *Picardi Hotels Ltd v Thekweni Properties (Pty) Ltd* 2009 (1) SA 493 (SCA).

[12] In reply to this defence, the applicant's deponent stated that during July 2008 the applicant and Propell concluded a loan agreement and security cessions. He alleged that in terms of clauses 6.1.9 and 9.2 of the cessions Propell was entitled to collect outstanding levies and other charges in the applicant's name. The sequestration applications, he said, were brought by Propell in the applicant's name.

[13] The cession agreements appear, as the applicant says, to confer on Propell the right to sue for arrear levies in the applicant's name. Whether such a right may competently be conferred is, however, open to question (see *Sentrakoop Handelaars Bpk v Lourens & Another* 1991 (3) SA 540 (W); *Myburgh v Walter NO*

2001 (2) SA 127 (C) at 130C-E; *LAWSA* 3rd Ed Vol 3 para 173 fn 3). If the right to the levies vested in Propell upon the conclusion of the loan agreement and cessions, which seems to be the case, the applicant would not be entitled to institute proceedings in its own name to recover the levies unless Propell re-ceded them to the applicant for that purpose.

[14] When I put these difficulties to Mr van Reenen, he informed me (after taking instructions) that his client would not like me finally to decide questions relating to the interpretation and effect of the cessions, given their broader commercial importance to Propell. The applicant would accordingly rely only on the judgment debt for its locus standi. For as long as the default judgment stood, the applicant was a creditor for the amount of the judgment, even if Propell rather than the applicant should have been the party to issue summons.

[15] Judgment in Arlene's rescission application was pending when I heard argument. The respondents' attorney subsequently filed an affidavit attaching an order granted on 25 November 2015 for the rescission of the default judgment. Subject to the next paragraph, the limited basis for locus standi against her has thus fallen away, which would put paid to the application for her sequestration.

[16] Shortly before judgment was to be delivered I received further supplementary affidavits by the attorneys acting for the applicant and Arlene respectively. The applicant's attorney said that his client had noted an appeal against the order granting rescission. Arlene's attorney responded that the noting of the appeal was an irregular step because the granting by a magistrate of rescission against a default judgment is not appealable. The latter contention appears to be borne out by *De Vos v Cooper & Ferreira* [1999] 4 All SA 432 (A) paras 1-2. Even if the rescission were appealable, I would be inclined, in view of the uncertainty surrounding the status of the default judgment, to exercise my discretion against sequestrating Arlene on the strength of such judgment.

[17] The default judgment stands as against Pedro. The applicant's locus standi against him is thus uncontroversial. (Since I do not know on what grounds the

magistrate rescinded the judgment against Arlene, I cannot say whether Pedro's rescission application, if he brings one, is likely to succeed.)

[18] For the sake of completeness I make two observations concerning locus standi in the present case: (i) Clauses 6.1.9 and 9.4 of the cession contemplate that Propell might re-cede a claim to the body corporate for purposes of taking action in the latter's name. However, the applicant did not allege that it had received a re-cession of the claim nor was it argued that there had been a re-cession by conduct. (ii) Section 9(1) of the Insolvency Act provides that a sequestration application may be brought by a creditor 'or his agent'. Sequestration proceedings might thus be an exception to the usual rule that a cedent cannot enforce a claim as an agent for the cessionary. Whether, where an agent launches the sequestration application, the proceedings may be brought in his name or must still be in the name of the creditor is unclear (contrast *Russouw NO v Wagenaar* 1923 EDL 165 at 167 and *Corder V Hanekom* 1934 CPD 46 at 48). At very least, though, the capacity of the applicant must be clearly stated. In the present case the applicant did not allege that it was acting as an agent for Propell. In the founding papers no mention of Propell was made at all. In the replying papers the deponent said that Propell had instituted proceedings in the applicant's name, which is not the same thing as saying that the applicant brought the proceedings as Propell's agent.

The order of Mantame J

[19] Arlene submitted that her co-ownership was terminated by Mantame J's order of 27 June 2013. I do not regard this as a tenable interpretation of the order. Para 1 of the order, containing the statement that the co-ownership was terminated, must be read in the light of the rest of the order. When that is done, it is clear that Arlene's co-ownership would in law only terminate once her share, or the property as a whole, was sold and transferred. That has not happened. She is still registered as a co-owner.

[20] The 'net proceeds' which were to be distributed in terms of para 9 of the order must mean the sale proceeds after deducting the amount owing to FNB and to the

applicant/Propell in respect of levies. The registered co-owners would continue to be responsible for the levies until the property was transferred out of their names.

[21] This is, however, by the way because the applicant does not have locus standi to sequestrate Arlene.

The full extent of the levies claim

[22] The extent of the claim for arrear levies and interest (whether it vests in the applicant or Propell) is relevant to the question of insolvency and benefit to creditors.

[23] In the founding papers the applicant was somewhat cavalier. The deponent said that, apart from the default judgment of R59 488,91, further levies and mora interest totalling approximately R244 000 had accrued since July 2011, bringing the applicant's total claim to about R304 000. In their answering papers the respondents complained that the applicant had provided no proof or substantiation of the further liability and the applicant was put to the proof thereof. Pedro claimed that he had made payments to Propell which were not reflected on the levies statement (he did not finish particulars). He also alleged that, pursuant to the default judgment, the applicant had sold his movable assets in execution but that the proceeds were not reflected on the levies statement.

[24] In reply the applicant attached a spreadsheet detailing, on a monthly basis running from November 2006 to August 2015, the ordinary levies, backdated/increased levies, parking levies, backdated/increased parking levies, insurance recovery, special levies, remote control and access tag, monthly interest, administration fees, payments and legal monitoring fees. The deponent said that the net proceeds of the movable property sold in execution were indeed credited to the account. I gather that this is the amount of R1304,51 reflected as a payment against the date 13 April 2012.

[25] The spreadsheet reflects that the co-owners were in arrears as at November 2006 and made no payments until September 2007. The arrears were cleared in May 2008 by way of a payment of R12 000. The co-owners again fell into arrears in

September 2008 and made no payments until June 2011, when a sum of R12 000 was again paid. There were three random payments in August/September 2011, whereafter no amounts whatsoever have been paid in respect of levies except for the execution proceeds of R1304,51 previously mentioned.

[26] The spreadsheet reflects that as at 5 June 2015, when the present applications were issued, the total indebtedness was R260 182 and that by 21 August 2015 it was R288 553. On my reading of the spreadsheet, this includes the amount of the arrear levies for which default judgment was given. (The amount of the default judgment seems to represent the amount owing as at May 2011 when the summons was issued. According to the spreadsheet, the amount outstanding had been reduced slightly by the time default judgment was given.) The applicant's deponent thus overstated the position when he alleged in the founding papers that the full indebtedness as at June 2015 was about R304 000.

[27] The replying papers were served on 20 October 2015. Pedro has not sought an opportunity to deal with the spreadsheet in a supplementary affidavit. If Pedro could refute its contents I would have expected him to do so.

[28] An in duplum point was raised in the answering papers. No attempt was made to show me the impact which the in duplum rule would have. If one were to apportion all payments in the spreadsheet (totalling R48 704) to interest (totalling R193 876), the claim of R288 552 as at August 2015 would comprise R145 172 interest and R143 380 capital. This is a very modest excess above the in duplum limit. And in Pedro's case (against whom the default judgment stands), interest would run afresh on the full amount of the judgment so that the in duplum limit in his case would not be breached.

[29] I thus proceed on the basis that as at June 2015 the respondents were indebted to the applicant/Propell in the amount of about R260 000 and that this amount has escalated since then as a result of continued non-payment.

Pedro's factual insolvency

[30] The applicant attached to its founding papers a Windeed automated valuation report which concluded that the value of Unit 62 ranged from a low of R570 000 to a high of R700 000 with an estimated value of R610 000.

[31] The respondents did not in their opposing papers disclose the amount owing to FNB. I afforded them an opportunity of providing this information which they did in a supplementary affidavit dated 20 November 2015 to which was attached the most recent bond statement. This shows that as at November 2015 the bond debt was R312 391.

[32] Pedro states that he has no assets of value, ie over and above his co-ownership of Unit 62. He says the value of the close corporation of which he is the member and which conducts business under the name Phoenix Fire Services is negligible. He denies that the business is profitable.

[33] Whether Pedro has creditors apart from FNB and the applicant/Propell is unclear. The applicant does not have knowledge of other creditors and Pedro has not alleged any other debts.

[34] If Pedro's only debts are to the applicant/Propell and the bank, and if he is jointly and severally liable with his co-owners for these debts, his liabilities total about R600 000 (R288 552 + R312 391). In regard to the bond liability, it may be more realistic to view each co-owner as liable for one-third of the debt, since the bank would look to the value of the property as a whole as its security. There is in any event no evidence that the bond liability is joint and several. Pedro's share of the bond liability is thus R104 130.

[35] There is also no satisfactory evidence that the co-owners' liability to the applicant for levies is joint and several rather than joint. The applicant said in its replying affidavit that it would make a copy of its management rules available to the court but did not do so. However it appears from Arlene's affidavit that Pedro is, as between himself and the other co-owners, liable for the property expenses from the

time he moved into the unit in 2010. If the other co-owners were called upon to make payment of the levies (whether on the basis of joint or joint and several liability), they would have a claim for recovery against Pedro except perhaps for their share of the arrear levies as at 2010. On this basis, Pedro has a liability for levies of about R255 000.[1]

[36] Pedro's total liabilities can thus be taken as being about R359 000 for purposes of the present proceedings, of which R104 130 is secured by the mortgage bond.

[37] According to the applicant, the median value of the property is R610 000. The respondents appear to think that the property is worth less. They allege that the applicant attempted to sell the property in execution during August 2014 and that the maximum bid was R60 000. Neither side suggests that the question of factual solvency should be determined with reference to the high-end valuation of R700 000.

[38] The Windeed valuation is not a sworn valuation but the result of a statistical calculation of values from various sources. The report reflects a 'safety score', an 'accuracy score' and a 'confidence level' in relation to the estimated value, presumably based on the quality of the data used to generate the valuation. In the present case the 'safety' and 'accuracy' scores were 90% and the 'confidence' level 'high'. This is not surprising since the 20 sales listed on page 2 of the report, which constitute the comparable data, are all sales of units in Harbour View over the period 2013-2014. They are thus highly comparable transactions.

[39] When one bears in mind that the Webbs bought the property in May 2006 for R468 000, I consider that R610 000 can be taken as a fair indication of the property's current value. On this basis, Pedro's one-third interest in the property is worth about R203 300.

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[1] If one assumes that the three co-owners are liable for one-third each of the arrears of about R50 000 owing at the end of 2010, Pedro's share would be R16 600. He would be solely liable (as between himself and the co-owners) for the balance of the arrear levies of R238 552 (R288 552 – R50 000), bringing his total liability for levies to R255 152.

[40] Prima facie, therefore, Pedro is factually insolvent.

Act of insolvency

[41] The applicant also relies on an alleged act of insolvency in terms of s 8(g) of the Insolvency Act. On 4 October 2012 Pedro wrote to the applicant's attorneys as follows:

'I … hereby take full responsibility for the levies due at Harbour View where I am currently residing.

I am waiting for payment from PWD Eastern Cape Health Department the amount owed to me from them is over a million, they have yet to pay and haven't made payment for over eleven months now. I… and Arlene Web divorced and Arlene has recused herself from the flat. My sister Charmaine Webb hasn't been resident in South Africa for over four years. As soon as funds are available I will make payment.

My sincere apologies for any inconvenience.'

[42] The context of this letter, it should be remembered, was a default judgment obtained against all three co-owners during July 2011. It appears that Arlene had probably complained to Pedro that he was failing to meet the property expenses and that this prompted his letter. Shortly thereafter, on 24 October 2012, attorneys acting on Arlene's behalf began corresponding with Pedro, and this led to the application in Case 4129/13.

[43] I do not think, in the circumstances, that Pedro's letter can be read as anything other than an acknowledgment that he owed money to the applicant in respect of levies and that he could not currently pay the debt. Although the act of insolvency occurred two years and eight months before the application was brought, all indications are that his financial position has not improved and that he is in fact insolvent. He has made no payments on account of levies subsequent to his act of insolvency.

Benefit to creditors

[44] Pedro denied that his sequestration would be to the benefit of creditors. Part of his complaint is that the property may be worth far less than what the applicant alleges. Even if this were so, the property is unlikely to have such a low value as to leave nothing meaningful for the concurrent claim of the applicant/Propell. With a bond liability of R312 000 and sequestration costs of R25 000, the property would only need to fetch about R540 000 to generate a concurrent dividend of 20 cents in the rand in Pedro's estate.[2] This is well beneath the low-end Windeed valuation of R570 000.

[45] There is the further advantage that a trustee will be able to investigate whether, as Pedro claims, his business has no value.

[46] The respondents contended that the presence of Charmaine as a third co-owner is likely to bedevil the sale of the property at a fair price. This is true but the same problem would exist if the applicant/Propell obtained judgment and executed in the ordinary way. If necessary, Pedro's share in the ownership of Unit 62 will have to be sold separately. However, I would expect Arlene and Charmaine to appreciate that their own interests will be best served by cooperating with the trustee in the sale of the whole of the ownership to best advantage. A trustee is likely to be better able to achieve this cooperation than the sheriff in a forced sale.

Conclusion

[47] In the circumstances the application for Arlene's sequestration must be dismissed but a provisional order will be granted against Pedro.

[48] If the default judgment against Arlene had not been rescinded, the application for her provisional sequestration may well have succeeded on the basis that she is

[2] R540 000 – R312 000 = R228 000 of which Pedro's one-third is R76 000. R76 000 – R25 000 (sequestration costs) = R51 000, yielding a concurrent dividend of 20 cents/rand on Pedro's levy liability of R255 000.

factually insolvent.[3] Since the judgment had not been rescinded when the application for provisional sequestration was launched or argued, and since it was by no means self-evident that the rescission application was bound to succeed, I think the parties in the application for Arlene's sequestration should bear their own costs. In Pedro's case, the usual provision will be made for costs. For the guidance of the taxing master, I think it fair that the costs of the appearance be divided equally between the two matters.

[49] I make the following order in Case 10618 (where the respondent is Arlene Webb): The application is dismissed with no order as to costs.

[50] I make the following order in Case 10619 (where the respondent is Pedro James Webb):

(a) The respondent's estate is placed under provisional sequestration in the hands of the Master.

(b) A rule nisi is issued calling upon all interested parties to show cause on Friday 29 January 2016:

(i) why the respondent's estate should not be placed under final sequestration;

(ii) the costs of the application, on the attorney and client scale, should not be costs of administration in the sequestration.

(c) Service of this order shall be effected in the following manner:

(i) on the respondent;

(ii) on the South African Revenue Service at Hans Strydom Avenue, Cape Town;

(iii) on the Master of this Court at Cape Town;

(iv) on the respondent's employees, if any, by the Sheriff;

(v) by publication in the *Cape Times* and *Burger* newspapers.

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[3] This is on the basis that her liabilities total about R240 000 (R104 130 in respect of the bond, R59 488 in respect of the default judgment and R76 354 as her one-third share of the rest of the levies [R288 552 – R59 488] and that her sole asset is a one-third interest in the property (worth R203 000). (The value of her right of recourse against Pedro in respect of the levies is doubtful.)

ROGERS J

APPEARANCES

For applicant in both cases:	Mr D van Reenen Instructed by Biccari Bollo Mariano Inc 5 Leeuwen Street Cape Town
For Respondents in both cases	Mr G Langenhoven 42 Tennant Road Kenilworth